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ABSTRACT

This working paper was prepared for use by the Special Committee on Aging, United States Senate, 95th Congress, 1st Session. It addresses the next steps in combating age discrimination in employment, with special reference to mandatory retirement policy. This paper is divided into the following major sections: (1) history, achievements, and shortcomings of the Age Discrimination in Employment Act; (2) challenges in mandatory retirement age; and (3) legislative actions and recommendations. (Author/JLL)

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THE NEXT STEPS IN COMBATING AGE DISCRIMINATION IN EMPLOYMENT: WITH SPECIAL REFERENCE TO MANDATORY RETIREMENT POLICY

A WORKING PAPER

PREPARED FOR USE BY THE

SPECIAL COMMITTEE ON AGING
UNITED STATES SENATE

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

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THE NEXT STEPS IN COMBATING AGE DISCRIMINATION IN EMPLOYMENT: WITH SPECIAL REFERENCE TO MANDATORY RETIREMENT POLICY

Prepared by Marc Rosenblum, Ph. D., Consultant*

Part 1

HISTORY, ACHIEVEMENTS, AND SHORTCOMINGS OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT

Congress is now engaged in the most detailed and serious review of age discrimination in employment since enactment of legislation [1] to combat such bias 10 years ago.

This reevaluation is closely related to a mounting challenge affecting mandatory retirement practices, and it is prompted also by several other key factors:

—The Age Discrimination in Employment Act (ADEA) during its decade of existence has given only limited protection to workers in the 40–65 age group it was meant to serve, and there is growing pressure to raise or eliminate the 65 limit.

—Older workers are badly disadvantaged by current widespread unemployment.[2] Their job problems should not be further intensified by discrimination in the job market.

—Widespread inability of older persons to find suitable work is occurring at a time when more older people are in better health. Although a smaller proportion of older Americans are active in the labor force past age 65 than was the case 10 years ago, those in good health and desiring to work require additional statutory protection.

—Social security trust funds, over the short run, are under greater pressure because unemployment has reduced payroll tax income while inflation has triggered higher cost-of-living increases. This

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[1] The Age Discrimination in Employment Act (ADEA) of 1967, Public Law 90–202, 29 U.S.C. 621.

[2] See, for example, "Recession's Continuing Victim: The Older Worker," a working paper prepared for the Senate Committee on Aging, July 1970; and part 2 of this report.

has raised growing speculation and discussion about steps to counter the current trend to earlier retirement.[3]

—Court cases interpreting the effect and purpose of ADEA have produced mixed results. Even now, more than 9 years after ADEA's effective date, Federal courts disagree over what practices Congress intended to permit and prohibit. Clearly, the courts need additional—and very precise—signals from Congress.

The working paper was prepared in cooperation with the Senate Committee on Human Resources, which will soon consider legislation to strengthen ADEA.

It was written soon after the House Committee on Education and Labor approved legislation to modify ADEA significantly by raising the current upper age limit of 65 years in ADEA to 70 years.

It is meant to serve as a convenient summary of (1) the history of ADEA and its achievements and limitations, (2) its relationship to efforts to combat, end, or modify involuntary retirement practices, and (3) the continuing problems of older workers in today's job market.

A. DESCRIPTION OF THE ACT AND ITS PROVISIONS

ADEA is historically linked to title VII of the Civil Rights Act of 1964[4] but has followed its own separate and distinct path. Concern with the increased employment problems of middle-aged and older workers emerged during the early 1960's. Age, though, was not included in title VII's prohibitions on employment discrimination based on race, sex, religion, or national origin.

Section 715 of that act directed the Secretary of Labor to study the problem of age discrimination and submit a report to the Congress. The Secretary concluded in 1965 that age discrimination was widespread, with serious consequences for both older workers as individuals and the Nation's economy.

In recommending congressional action to eliminate arbitrary age discrimination in employment, the Secretary declared:

> The possibility of new nonstatutory means of dealing with such arbitrary discrimination has been explored. That area is barren.[5]

President Johnson called for legislative action to prohibit employment discrimination on the basis of age in his January 1967 Message on Older Americans. Less than 2 weeks later, a bill was introduced in Congress which became the basis of the law passed later that year. ADEA became effective on June 12, 1968.

The act's purpose is specified in section 2(b):

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[3] For discussion of social security financing, see pp. 14–16, "Development in Aging: 1976." Former Social Security Commissioner Robert Ball has said, for example: "The most significant social trend causing higher than necessary social security costs in the next century is the trend toward earlier retirement. In the 1974 trustees' report the actuaries assumed a continuation of this trend—an assumption that resulted in an estimated additional cost to the system of 0.14 percent of payroll. If we could reverse this trend and have greater labor force participation among older people in the next century than we have today, there could be a significant saving for social security over what is currently estimated." U.S. Senate Special Committee on Aging, hearings, "Future Directions in Social Security," part 11, Washington, D.C., Mar. 20, 1975, p. 956.

[4] Public Law 88–352, 42 U.S.C. 2000e (1964).

[5] "The Older American Worker: Age Discrimination in Employment." Report of the Secretary of Labor to the Congress under section 715 of the Civil Rights Act of 1964 (1965).

> . . . [T]o promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Coverage extends to all members of the civilian labor force between the ages of 40 and 64. There are 36.7 million men and women in this category, or 37.8 percent of the 97.1 million civilian workers age 16 and above as of the second quarter of 1977.[6]

ADEA did not initially cover Federal, State, or local government employees. The Fair Labor Standards Amendments of 1974 extended ADEA's protection to most Government employees, with the exception of elected officials and certain other special categories.[7]

Administration and enforcement of ADEA is divided. The U.S. Civil Service Commission is responsible for Federal employees. All other workers, either in the private sector or in State and local government, are under the jurisdiction of the Department of Labor's Employment Standards Administration.

There are certain exemptions based on the size of affected organizations. To be covered, private employers must have 20 or more employees during each of 20 weeks in the current or preceding year.

Employment agencies and labor organizations are also covered if they refer applicants to employers covered by the act. Furthermore, labor organizations are also subject to coverage if their membership exceeds 25 persons.

The act's prohibitions are specified in section 4.

It is unlawful for an employer to:

> . . . fail or refuse to hire, discharge, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of age.

It is also illegal for an employment agency to:

> . . . fail or refuse to refer for employment, or in any other way discriminate against anyone due to age or to classify or refer anyone for employment on the basis of age.

Labor organizations are not permitted to:

> . . . exclude or expel from its membership, or otherwise discriminate against any individual because of age; to limit, segregate or refuse to refer for employment, any individual in any way which would deprive the individual of job opportunities, limit job opportunities, or otherwise affect his or her status as an employee or job applicant because of the individual's age; to cause or attempt to cause an employer to discriminate against an individual because of age.

ADEA also prohibits employment advertisements that are biased on the basis of age. Under this provision:

> Employers, employment agencies, and labor organizations under the act's jurisdiction are not permitted to use printed or

[6] U.S. Department of Labor, Bureau of Labor Statistics.
[7] Public Law 93–259, 29 U.S.C. 633a (1974).

> published notices or advertisements relating to employment which indicate any preference, limitations, specifications, or discrimination based on age.

A further safeguard in section 4 is the retaliation provision. This makes it an additional violation for anyone covered by the act—employer, employment agency, or labor organization—to discriminate against a person because that person has complained of age discrimination or is a party to litigation under ADEA.

Thus, the first five subsections of section 4 (a) through (e) enumerate what constitutes age discrimination in employment. The final subsection, (f), provides for certain exceptions to the conduct made illegal for those under the act's jurisdiction—employer, employment agency, or labor organization.

The three exceptions under section 4(f) allow what would otherwise be considered discriminatory behavior on the basis of age:

> (1) Where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.
>
> (2) To observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this act, except that no such employee benefit plan shall excuse the failure to hire any individual.
>
> (3) To discharge or otherwise discipline an individual for good cause.

In addition to these statutory exemptions, the Secretary of Labor is empowered to create additional special categories of exemptions under section 9. At present, exemptions apply to employment and training programs sponsored by the Department of Labor, the State public employment services, and bona fide registered apprenticeship programs approved by the Department.

Section 5 of the act directs the Secretary of Labor to:

> . . . undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress.

No date was specified for the Secretary to make this report. In a working paper published by this committee 4 years ago, it was noted that:

> After more than 5 years, no such report has been made, although the Department of Labor reports that research has begun. [8]

That sentence can be simply amended to now read: After more than 9 years, no such report has been made, although the Department of Labor reports that research is continuing.

Congressional units have made it clear that further delay at this point is inappropriate, since involuntary retirement is a major ele-

[8] U.S. Senate Special Committee on Aging, "Improving the Age Discrimination Law," 93d Cong., 1st sess. (1973).

ment of age discrimination against older workers. H.R. 5383, as reported by the Committee on Education and Labor on July 14, 1977, would both broaden the scope of the Secretary's study to include the feasibility of eliminating the act's upper age limit and specify that the report—at least in interim form—be completed within 1 year.

B. LEGISLATIVE HISTORY

The original legislative proposal was modified in several ways before enacted as the Age Discrimination in Employment Act. Initially, workers between 45 and 65 years of age were covered under the bill. The Secretary of Labor's 1965 report had found that approximately half of all private sector job openings were limited to applicants below age 55. Similarly, persons above age 45 would not be considered for about one-fourth of all job openings.[9]

The Senate agreed to a House change to lower the age limit to 40. The upper age limit, 65, was not the subject of lengthy debate, although the original proposal gave to the Secretary of Labor discretionary authority to vary the limits—upper and lower—as he deemed necessary.

Secretary Willard Wirtz testified before the Senate Subcommittee on Labor that this authority (to adjust the age limit upward beyond 65) was "desirable to protect those workers above 65 who want and need to work which they are fully capable of performing and also to foster manpower utilization." [10] As passed, the act did not contain this provision, but instead required the Secretary to conduct a special study and report back to the Congress within 6 months.

In that report, Secretary Wirtz determined that compulsory retirement and the upper age limit, 65, were closely related. Since the section 5 study was to address involuntary retirement, the Secretary felt that legislative recommendations could be made in that report. As a result, no change in the upper age limit was made at that time. As previously noted, however, the section 5 study and the legislative recommendations that were to accompany it have not been completed.

The original legislative proposal also called for agency-type enforcement of ADEA, similar to the Equal Employment Opportunity Commission (EEOC) that was established to administer title VII of the Civil Rights Act. An amendment by Senator Javits shifted administrative responsibility for ADEA to the fair labor standards mechanism, that is, the Wage and Hour Division.[11]

Senator Javits also was responsible for the amendment of section 4(f)(2), to be discussed later in connection with litigation under ADEA. The administration's bill, S. 830, contained the following language in its version:

> (2) to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act.

The statutory language, as passed, differs somewhat:

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[9] The Older American Worker, op. cit., pp. 6–7.
[10] U.S. Senate Committee on Labor and Public Welfare, "Age Discrimination in Employment," hearings before the Subcommittee on Labor (1967).
[11] U.S. Senate. Report to Accompany S. 830. Age Discrimination Act of 1967. Individual views of Mr. Javits. Senate Report No. 723, 90th Cong., 1st sess. (1967).

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> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual.

As Senator Javits noted:

> I believe the bill has also been improved by the adoption of language, based on an amendment which I had offered, exempting the observance of bona fide seniority systems and retirement, pension, or other employee benefit plans from its prohibitions. . . . In its absence employers might actually have been discouraged from hiring older workers because of the increased costs involved in providing certain types of benefits to them.[12]

The Senator's own bill, S. 788, utilized the fair labor standards mechanism and did not contain any exemptions other than one for bona fide occupational qualifications, akin to section 4(f)(1). His insistence on the term "bona fide" in connection with the section 4(f)(2) exemption carries a strong inference that such exemption was limited to differential fringe benefits for newly hired older workers.[13] It was not intended to permit the involuntary retirement of workers prior to age 65 on the basis of corporate pension plans, although judicial interpretation has permitted this practice in some cases.

This interpretation was reconfirmed by Senator Javits on June 28, 1977. In his statement accompanying S. 1773, Age Discrimination in Employment Amendments of 1977, he declared:

> The purpose of this amendment was to facilitate the hiring of older employees by permitting their employment without necessarily providing equal benefits under employee benefit plans. As I stated on the Senate floor to Senator Yarborough, the bill's floor manager. "The meaning of the provision is as follows: An employer will not be compelled under this section to afford to older workers exactly the same pension, retirement or insurance benefits as he affords younger workers." Senator Yarborough explicitly agreed with my explanation of the provisions.
>
> Yet despite this clear explanation, the U.S. Court of Appeals for the Third Circuit in *Zinger* v. *Blanchette*, 549 F.2d 901 (3rd Cir. 1977), has construed section 4(f)(2) to mean that mandatory retirement under a plan at less than age 65 at the option of the employer is lawful. The effect of *Zinger* is to deny the ADEA's protection with respect to forced early retirement to 6 million employees who are members of plans which permit the employer to force early retirement before age 65 and to encourage other employers to include similar provisions in their plans covering an additional 29 million employees.
>
> * * * * * * *

[12] Ibid.
[13] U.S. Senate Committee on Labor and Public Welfare, "Age Discrimination in Employment," hearings before the Subcommittee on Labor (1967).

> Before the Supreme Court considers the arguments about what the Congress intended by section 4(f)(2), I think it is encumbent that Congress make clear that this provision was never intended to permit the wholesale evasion of the ADEA's protections. As the Fourth Circuit in *McMann* observed, "We think it unlikely that Congress intended to leave the vast loophole in this broad remedial legislation which . . . (the employer) . . . would have us fashion." [14]

C. HOW ADEA HAS PERFORMED

ADEA did not apply to Federal, State, and local governmental employees until 1974. It did not, and still does not, apply to employers of less than 20 workers. Thus, until 1974, almost half of all workers between the ages of 40 and 65 were not covered by the act.

Including Government employees, the Secretary of Labor recently estimated that about 70 percent of workers in the 40- to 65-age range are covered by ADEA.[15] Unfortunately, not all governmental bodies are model employers. According to the Secretary's latest report to Congress:

> Compliance activity with respect to State and local governments disclosed a greater number of violations during fiscal year 1976 in each type of illegal practice than in 1975.[16]

The Secretary's report does not cover enforcement responsibility for the Federal Government, which rests with the U.S. Civil Service Commission.

The number of complaints received may be one indicator of age discrimination. As the table indicates, the number of complaints has risen for every year since the act's effective date.

TABLE 1.—AGE DISCRIMINATION COMPLAINTS RECEIVED BY THE SECRETARY OF LABOR

Fiscal year:	*Complaints*
1969	1,031
1970	1,344
1971	1,658
1972	1,862
1973	2,208
1974	3,040
1975	4,717
1976	5,121

This steady rise in complaints can be attributed to several factors, including:

—A greater awareness of ADEA by workers.

—Extension of coverage under ADEA in 1974 to smaller employers (prior to the 1974 amendments the minimum number of employees for coverage was 25, not 20).

—Extension of coverage under ADEA in 1974 to Government employers.

—Insufficient economic growth in recent years to provide for full employment, with particular reference to the 1974–75 recession and its lingering effect on older workers.

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[14] 123 Congressional Record S. 10954–55 (1977).
[15] U.S. Department of Labor, Employment Standards Administration. Age Discrimination in Employment Act of 1967, a report covering activities under the act during 1976 (1977).
[16] Ibid., p. 13.

The Secretary of Labor's annual report does not identify the number of complaints or violations by category, or type of illegal practice. The 1977 report does indicate, however, that illegal discharges increased by 41 percent over the prior year.[17]

D. THE COURTS AND AGE DISCRIMINATION: A MIXED RECORD

From the very beginning, there has been a direct relationship between ADEA and growing concern about *mandatory* retirement practices. This is not to be confused, of course, with a worker's own decision to leave the labor force, although a decision that may be caused by health problems or other factors.[18]

At present, mandatory retirement at age 65 is permitted by the act. Several Senate bills would raise the upper age limit by varying amounts. As long as some upper limit is specified by the statute, employers would be permitted to retire workers unilaterally once they pass that ceiling. Under H.R. 5383, reported by the House Committee on Education and Labor on July 14, 1977, the age limit for private sector workers would rise from 65 to 70.

Perhaps the best indication of mandatory retirement's seriousness as both a social and economic issue is in the legal arena. Mandatory retirement has been raised repeatedly as a constitutional issue as well as statutorily under ADEA.

All constitutional challenges to mandatory retirement had failed until a three-judge Federal district court ruled on June 28, 1977, that the Foreign Service Act of 1946 [19] requiring retirement at age 60 of U.S. foreign service officers, violates the equal protection clause of the fifth amendment.[20]

1. Constitutional Cases

The significance of *Bradley* is fourfold. It marks the first time a constitutional challenge to mandatory retirement under the fifth amendment has been successfully raised. The line of 14th amendment cases, to be discussed below, have all ended in defeat for the older worker plaintiffs.

Second, the court applied a rational basis test rather than a strict scrutiny test [21] in deciding that foreign service officers work under similar conditions abroad compared with thousands of other non-State Department Government employees. This distinction, a technical one in constitutional law, is of great importance since most Federal courts have held that discrimination on the basis of age is justified if there is any rational basis at all for it. The U.S. Supreme Court relied on the rational basis test in deciding *Massachusetts Board of Retirement* v. *Murgia:*

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[17] Ibid., p. 12.
[18] Of the 16 million retired workers drawing social security benefits at the end of 1974, 8.7 million, or 54.5 percent, had retired early with some reduction in benefits.
[19] 22 U.S.C. 1002 (1946).
[20] *Bradley* v. *Vance* (Secretary of State), —— F.Supp. —— (D.D.C. 1977).
[21] Under a strict scrutiny test, courts will presume that a distinction between groups or classes of people is suspect, and must be explained fully to be upheld. A rational basis test, on the other hand, presumes that a classification made by Government authorities is rational, and therefore legal, unless shown to be otherwise by a preponderance of evidence.

> That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation.[22]

A strict scrutiny test, on the other hand, is only invoked when either a fundamental right is violated or a law discriminates against a suspect class of persons, such as classifications based on race or sex. If the question of equal protection is measured by the strict scrutiny test, the statute rarely survives. Obviously, the Supreme Court is not, at this time, inclined to regard protection from involuntary retirement as a fundamental right under the Constitution.

Third, the *Bradley* decision explicitly rejects as discriminatory the often cited rationale of "creating advancement opportunities for younger people." The court declared: "However, an interest in recruiting and promoting younger people solely because of their youth is inherently discriminatory and cannot provide a legitimate basis for the statutory scheme."[23] As noted below, employers frequently have viewed this argument as a legitimating factor for their practices of mandatory retirement.[24]

The fourth and possibly most interesting aspect of *Bradley* is that the plaintiff's case had previously been brought under ADEA and lost.[25] In an earlier ruling the district court held that since *Bradley* (and other members of the similarly situated class of Foreign Service officers) were entitled to pension benefits under the Foreign Service Act, they could be retired under the section 4(f)(2) exemption of ADEA. This interpretation rests, of course, on the precedent of *Brennan* v. *Taft Broadcasting Co.* (discussed below) that the bona fide nature of retirement plans is based on their payment of benefits, irrespective of the involuntary nature of the employee's retirement.[26]

Obviously the facts in *Bradley* v. *Vance* (Secretary of State) are similar to *McMann* v. *United Airlines*, discussed below, which will be reviewed by the U.S. Supreme Court following a Fourth Circuit decision in favor of the plaintiff.[27] The second *Bradley* decision held, in effect, that the relevant issue was whether involuntary retirement of Foreign Service officers at age 60 was in any way rational, given substantial evidence of other civil service employees working abroad until age 70. Given the decision that it was not, Bradley's pension entitlement was considered irrelevant to the finding that section 632 of the Foreign Service Act is unconstitutional.

PREVIOUS CASES

While *Bradley* was able to raise both ADEA and constitutional claims (and prevail on the latter), previous cases covering mandatory retirement of Government employees that form the body of case law could not. ADEA protection was not extended to Government workers

[22] 427 U.S. 307, 316 (1976).
[23] *Bradley* v. *Vance* (Secretary of State), supra., Slip Op. at 3.
[24] Testimony of Robert Thompson, chairman of the labor relations committee, Chamber of Commerce of the United States, June 2, 1977, Hearings on Age Discrimination in Employment Amendments of 1977, U.S. House of Representatives, Committee on Education and Labor, Subcommittee on Employment Opportunities.
[25] *Bradley* v. *Kissinger* (Secretary of State), 418 F.Supp. 64 (D.D.C. 1976).
[26] 500 F.2d 212 (5th Cir. 1974).
[27] 542 F.2d 217 (4th Cir. 1976), cert. granted, 429 U.S. 1090 (1977).

until May 1, 1974, and the three principal cases were all initiated prior to that date. Even though the last of those cases, *Massachusetts Board of Retirement* v. *Murgia*, was not decided by the U.S. Supreme Court until 1976, the plaintiff was limited to the constitutional, nonstatutory grounds available in 1972 when the case was first filed.

The first case to challenge the constitutionality of mandatory retirement—*McIlvaine* v. *Pennsylvania*—was similar to *Murgia*, insofar as the plaintiff was a police officer, although the age involved was 60. The State Supreme Court of Pennsylvania rejected the 14th amendment equal protection argument, and the U.S. Supreme Court dismissed the plaintiff's appeal.[28]

The decision in the *McIlvaine* case was used by a Federal district court to decide *Weisbrod* v. *Lynn* on technical grounds without addressing the question raised by Weisbrod, whether mandatory retirement of Federal employees at age 70 was unconstitutional under the 14th amendment. The court held that the Supreme Court's dismissal of *McIlvaine* resolved the constitutional question, leaving no issue for the three-judge panel to decide.[29] The Supreme Court summarily upheld this interpretation of the technical ruling without consideration of the argument Weisbrod had tried to raise.

Thus, *Murgia* represents the only Supreme Court expression on mandatory retirement as a constitutional issue under the equal protection clause of the 14th amendment. The Supreme Court's decision reversed a three-judge district court ruling that Massachusetts had failed to demonstrate any rational relationship between the State's legitimate interest in maintaining a physically fit police force and mandatory retirement.[30]

The Supreme Court determined that age was not a suspect class, like race or sex. If it had so held, the implication was that under a strict scrutiny standard each policeman's physical condition would have to be individually determined without reference to age in determining fitness. The Court acknowledged that Murgia was in excellent health when retired, and had recently passed a stringent physical exam.[31]

By relying on a rational basis standard, the Court focused on the generalized relationship between age and physical condition, ignoring the distinction between group trait averages and individuals within that group. The opinion states:

> Since physical ability *generally* declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work *presumptively* has diminished with age. (Emphasis added.)[32]

No such generalizations are present in the Court's title VII rulings. The categorization of employees on the basis of race or sex is suspect, and in the absence of compelling reasons not permitted.[33] Only Mr. Justice Marshall's dissent framed the issue in perspective:

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[28] *McIlvaine* v. *Pennsylvania*, 415 U.S. 986 (1974), dismissing appeal from 454 Pa. 129, 309 A.2d 801 (1973).
[29] 420 U.S. 940 (1975), affirming 383 F.Supp. 933 (D.D.C. 1974).
[30] *Murgia* v. *Massachusetts Board of Retirement*, 376 F.Supp. 753 (D. Mass. 1974).
[31] *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. at 311.
[32] 427 U.S. at 315.
[33] *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 727 (1976).

> Whether older workers constitute a "suspect" class or not, it cannot be disputed that they constitute a class subject to repeated and arbitrary discrimination in employment.[34]

The *Murgia* decision was a particular blow to the advocates of older workers' employment rights, in the light of the presumed analogy between that case and the Supreme Court's decision in *Cleveland Board of Education* v. *LaFleur*.[35] In *LaFleur* the Court found a school board policy requiring all pregnant teachers to take unpaid maternity leave after the fourth month, regardless of physical condition, to be a denial of the right to due process under the 14th amendment. The opinion reads:

> The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.[36]

The same logic would seem to apply to mandatory retirement, and to the case-by-case fitness of older workers to remain employed. The Supreme Court failed to reach that conclusion, however.

2. Statutory Cases

Until and unless the Supreme Court rules mandatory retirement to be constitutionally impermissible, the sole recourse will be through ADEA. Thus, the upcoming congressional debate on bills to revise and clarify section 4(f)(2) is especially relevant to the question of mandatory retirement. As mentioned above, the House Committee on Education and Labor has reported legislation that would unequivocably forbid participation in a pension plan from being used to force employees into retirement.

A trio of cases, *Taft Broadcasting*, *Zinger*, and *McMann*, constitute the significant range of judicial interpretation of this section. A 2 to 1 majority in *Taft Broadcasting* rejected Judge Tuttle's dissenting view that since the retired employee had seen only an ambiguous summary of the profit-sharing retirement plan (which the court agreed was a pension plan under the act), rather than the complete document, then there was no agreement on a bona fide retirement plan by which he could be bound. The majority also stressed that Taft's plan predated the act, a position since rejected by both the *Zinger* and *McMann* courts as irrelevant.[37]

In reversing a district court that had relied on *Taft Broadcasting*, the Fourth Circuit Court of Appeals found, in *McMann* v. *United Airlines*, that the involuntary retirement of a 60-year-old employee brought about solely because of his membership in a pension plan calling for retirement at that age was illegal. The fourth circuit stated:

> Thus, in order to qualify for the exemption, a plan must not be a subterfuge to evade the act's purpose of prohibiting arbitrary age discrimination. Stated otherwise, there must

[34] *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. at 324.
[35] 414 U.S. 632 (1974).
[36] 414 U.S. at 798.
[37] *Brennan* v. *Taft Broadcasting Co.*, 500 F. 2d 212 (5th Cir. 1974).

> be some reason other than age for a plan, or a provision of a plan, which discriminates between employees of different ages.[38]

Just because a plan predated passage of ADEA did not "immunize" it from scrutiny, the court held. The act's legislative history clearly states that the exemption applies:

> . . . to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employment benefit plans.[39]

The *McMann* decision further rested on the logic that while the act's other exceptions—age as a bona fide occupational qualification (section 4(f)(1)) and good cause for termination irrespective of age (section 4(f)(3))—were not inherently discriminatory, any other interpretation of section 4(f)(2) would disadvantage millions of older workers. Employers could, under the ruling sought by the airline, buy their way out of compliance with ADEA by setting a pension plan retirement age however low they chose and unilaterally retire employees at that time (or, at company option, permitting them to continue working if needed).[40]

The last of the three principal rulings on involuntary retirement on the basis of section 4(f)(2) was issued on January 20, 1977, by the Third Circuit Court of Appeals. *Zinger* v. *Blanchette* upheld the retirement plan as bona fide because, in the court's view, the amount of Zinger's pension was sufficient.

> . . . and the pension payable (is) not unreasonable—certainly not so small as to brand the plan a subterfuge to evade the purposes of the act.[41]

The court advanced a second argument that, like the sufficiency of the pension, had not been raised in prior appellate cases. The latter distinction centered on a difference between firing a worker and forcing the employee to retire on a pension:

> There is, however, a clear, measurable difference between outright discharge and retirement, a distinction that cannot be overlooked in analyzing the act. While discharge without compensation is obviously undesirable, retirement on an adequate pension is generally regarded with favor.[42]

The opinion did not specify by whom such retirement was regarded with favor, but it may be assumed that Mr. Zinger was not the object of the generalization. On the facts of the case the plaintiff did not

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[38] *McMann* v. *United Airlines*, 542 F. 2d 217 (4th Cir. 1976), cert. granted, 429 U.S. 1090 (1977).

[39] U.S. House of Representatives Report to accompany H.R. 13054, Age Discrimination in Employment Act of 1967. House Report No. 805, 90th Cong., 1st sess. (1967).

[40] See, for example, *Raymond* v. *Bendix Corp.*, 15 FEP Cases 49, (E.D. Mich. 1977). The employer's motion for summary judgment and dismissal of the charges on the grounds that section 4(f)(2) permits involuntary retirement under the terms of its pension plan was denied. The court noted that the company had continued to reduce the age at which employees could be involuntarily retired, down to its present level of age 55.

[41] 549 F. 2d 901 (3d Cir. 1977).

[42] 549 F. 2d at 905.

suffer a calamitous loss of retirement income, as his involuntary retirement came only months prior to his 65th birthday. By continuing to work until that age, his pension would have increased by $834 per year.

But Zinger had argued that his involuntary retirement was a subterfuge to avoid the intent of section 4(f)(2) and hence discriminatory on the basis of age, rather than a subterfuge on the basis of the $834 difference which he would have been entitled to less than a year later.

The court's conclusion placed it in direct conflict with the *McMann* ruling:

> To summarize, involuntary retirement pursuant to a bona fide plan that is not a subterfuge but which requires or permits retirement at age 60 at the option of the employer is not unlawful.[43]

United Airlines petitioned the U.S. Supreme Court for a review of the Fourth Circuit's findings, and that petition was granted. The case, now designated as *United Airlines* v. *McMann*, will be heard during the fall 1977 term which begins in October.

Whatever action the Congress takes with reference to section 4(f)(2), a number of cases remain pending that will be bound by the Supreme Court's decision in *McMann*. Two cases are on appeal, both in the Ninth Circuit.[44] In each instance the employers' pension plans were ruled to be bona fide by Federal district courts. Thus, the practice of involuntary retirement has neither been limited to the several major cases reviewed above, nor resolved in favor of older workers in most cases. Congressional action appears to be warranted and timely to clarify the issue without further delay.

E. THE SECTION 4(f)(2) ISSUE AND COLLECTIVE BARGAINING

Can a retirement age negotiated between labor and management be regarded as a violation of ADEA if the retirement age is lower than the age limit of the ADEA? A number of agreements below the present 65-year ceiling for ADEA have survived on the basis of custom, tradition, and the absence of judicial challenge.

A distinction can be drawn, however, between those collective bargaining agreements which permit retirement with attractive benefits below age 65 and those which require it.

The United Auto Workers and United Steel Workers unions have successfully negotiated a "30-and-out" arrangement, permitting employees to retire on a full pension after 30 years of service. Recent estimates indicate that less than 5 percent remain active up to age 65. The remainder have, at their own choosing, gone on to second jobs, leisure hobbies, or whatever else appeals to them.

This distinction between optional and mandatory retirement will figure significantly in discussions of legislation to raise the top limit of ADEA from 65 to 70 or even higher.

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[43] 549 F. 2d at 910.

[44] *Dunlop* (Secretary of Labor) v. *General Telephone Co. of California*, 13 FEP Cases 1210 (C.D. Cal. 1976), *appeal pending sub nom, Marshall* (Secretary of Labor) v. *General Telephone Co. of California*, No. 76-2371 (9th Cir. 1977); *Dunlop* (Secretary of Labor) v. *Hawaiian Telephone Co.*, 415 F.Supp. 330 (D. Hi. 1976), *appeal pending sub nom, Marshall* (Secretary of Labor) v. *Hawaiian Telephone Co.*, No. 76-2874 (9th Cir. 1977).

Part 2

WHY MANDATORY RETIREMENT IS BEING CHALLENGED

Public attitudes toward mandatory retirement reflect a series of factors affecting many Americans. These factors include:

—A longer average life expectancy.
—Improved health and health-care techniques.
—The desire to maintain previous gains in the standard of living.
—Growing recognition of the detrimental effects of enforced idleness.
—The concept of age as a civil right.
—Inflation as a more than transitory phenomenon.

While these factors are just enumerated and not discussed here in detail, each can be viewed as contributing to the reluctance of older workers to accept mandatory retirement as inevitable. A recent article fully captured the essence of this attitude in its title, "Do Not Go Gently. . . ." [1]

Most fundamental to this challenge is the need to work and the relative scarcity of jobs available to older workers. While the number of persons employed has expanded over the past year, the size of the labor force has also risen almost as rapidly. Moreover, most of the job growth centered among young workers, and in particular younger families.

As table 1 indicates, between 1976 and 1977, total employment in the United States rose by 2.9 million jobs to 90.3 million. Only 312,000 more jobs were held by workers age 55 or above during the second quarter of 1977, however, compared with the second quarter of 1976. As a share of the Nation's job total, this actually represented a decline, to 15.2 percent, from 15.4 percent a year earlier.

TABLE 1. EMPLOYMENT BY AGE, SEX

[In thousands]

Age/sex	Second quarter, 1976	Second quarter, 1977	Change	Percent change
Male:				
55 plus	8,372	8,543	171	+2.0
55 to 64	6,651	6,811	160	+2.4
65 plus	1,721	1,732	11	+.6
All ages	52,501	53,858	1,357	+2.6
Female:				
55 plus	5,060	5,201	141	+2.8
55 to 64	4,056	4,167	111	+2.7
65 plus	1,004	1,034	30	+3.0
All ages	34,940	36,469	1,529	+4.4
Both sexes:				
55 plus	13,432	13,744	312	+2.3
55 to 64	10,707	10,978	271	+2.5
65 plus	2,725	2,766	41	+1.5
All ages	87,441	90,327	2,888	+3.3

[1] Harvey D. Shapiro, "Do Not Go Gently . . .", New York Times magazine, Feb. 6, 1977.

Put another way, employment grew for the entire economy by 3.3 percent, but by only 2.3 percent for older workers. This growth constitutes a vigorous job expansion, year to year, on an historic basis. But the gain is more than offset by an equally unprecedented rise in labor force size, or the number of persons available for work and those employed.

The civilian work force, as of the second quarter of 1977, stood at 97.1 million Americans, 2.7 million more than a year earlier. The expansion was 2.8 percent. For older workers, however, the increase was only 241,000, or 1.7 percent. The majority of this latter gain, 141,000 workers, were older women, age 55 and above.

Some observers have overlooked the increasing labor force activity on the part of older women at the same time that labor force participation of similarly aged men continues to decline. If involuntary retirement did not have an ongoing and cumulative effect on older men workers, what accounts for the unexpectedly large number of females in that age range coming back into the labor force? There are undoubtedly a number of motives to explain the labor force activity of these women. However, no list would be complete without the need to augment or protect the family standard of living after a spouse has been mandatorily retired.

As table 2 indicates, total labor force participation by older men fell further during the past year, while the rate for all men rose from 78.3 to 78.4 percent. For women, on the other hand, participation increased in all age groups, including older workers.

TABLE 2.—LABOR FORCE PARTICIPATION RATES AND CHANGE EXPRESSED IN PERCENTAGE POINTS

Age/sex	Second quarter, 1976	Second quarter, 1977	Change
Male:			
55 plus	47.9	47.5	−0.4
55 to 64	74.4	74.1	−.3
65 plus	20.2	19.8	−.4
All ages	73.3	78.4	+.1
Female:			
55 plus	22.8	23.0	+.2
55 to 64	40.7	41.0	+.3
65 plus	8.2	8.4	+.2
All ages	47.0	48.3	+1.3
Both sexes: All ages	62.0	62.7	+.7

The greater participation by older women, compared with relatively modest gains in jobs available to them, led to a standoff: 141,000 more older women looking for work, 141,000 more jobs held by older women workers. This left 242,000 older women unemployed, exactly the same number that had been jobless a year earlier. Moreover, this occurred at a time when total unemployment fell by one-quarter million persons, or by 3.2 percent of those who had been out of work a year earlier.

Accordingly, the proportion of unemployed women workers, age 55 and above, climbed to 3.6 percent of all those unemployed, compared with 3.5 percent a year earlier. While female unemployment, at all

ages, continues to rise relative to males, the share borne by older women is especially disturbing.

Insofar as older workers are hit harder by unemployment, when measured by the duration or length of each jobless spell, any rise represents a greater burden relative to those workers able to find other employment more rapidly. But, as mentioned above, if some of these older women workers are in the labor market to mitigate the effects of their spouse's involuntary retirement and are unable to find work, the effects can be tragic.

A. ATTEMPTING TO BROADEN WORK OPPORTUNITIES FOR OLDER WORKERS

It is one thing to ban age discrimination in employment. It is another to broaden work opportunities for older men and women in order to reduce pressure for them "to make way for younger workers."

The Congress, within recent years, has given increasing attention to the need to develop comprehensive employment and training policies for middle-aged and older workers. No discussion of ADEA and action against mandatory retirement would be complete without a review of past efforts to achieve this purpose and several now under consideration.

Over the years, the Congress has enacted measures to promote job opportunities for mature workers. The Older American Community Service Employment Act became law in 1973, as part of the Older Americans Comprehensive Services Amendments of 1973. Today, nearly 37,400 low-income persons 55 or older are employed as "senior aides" in a wide range of useful and fulfilling capacities. This figure would rise to 47,500 (beginning on July 1, 1978) under the fiscal 1978 Labor-HEW Appropriations Act (H.R. 7555).

Older workers have also benefited from the public service jobs programs of the Comprehensive Employment and Training Act. In fiscal 1976, almost 36,000 persons 55 or older were enrolled in the title II public service jobs program in areas with high structural employment and the title VI countercyclical jobs program. Older workers, however, accounted for only about 5 percent of the enrollees in these community service jobs programs.

Members of Congress have also introduced legislation in 1977 to provide special emphasis work and training programs targeted at the needs of middle-aged and older workers. One example is Representative Roybal's Middle-Aged and Older Workers Employment Act (H.R. 2514). It would establish a Midcareer Development Services Bureau in the Department of Labor to assist middle-aged and older workers (persons 40 and older) to find employment by providing training, counseling, and special supportive services. H.R. 2514 would also authorize the Secretary of Labor to:

(1) Make training loans and grants to upgrade the work skills and capabilities of persons 40 or older.

(2) Train personnel to train and retrain middle-aged and older workers to develop skills which are needed in the communities in which they reside.

(3) Recruit and train personnel to provide placement, recruitment and counseling services in communities where there is substantial

unemployment because of a plant shutdown or other permanent reduction in the work force.

(4) Establish special services for persons who desire to improve their employability or capabilities in their present job.

Another approach is the Equal Opportunity for Second Careers Act of 1977 (H.R. 3072), sponsored by Representatives Scheuer and Waxman. H.R. 3072 would authorize the Secretary of Labor to establish regional employment councils to develop second career programs for individuals 40 years or older who are unemployed or underemployed. Second career program services would include job inventories and job development; outreach and promotion; screening and appraisal procedures; job matching services; job referral, trial work experience and placement services; ongoing training and education; and other services. The Secretary of Labor would also be authorized to conduct research and demonstration projects to help unemployed or underemployed individuals to enter or reenter the labor force.

B. GOING FORWARD AND BACKWARD: WHO'S AHEAD?

The precise number of workers subject to mandatory retirement on the basis of their age is not known. According to a survey conducted by the U.S. Department of Labor in 1973, almost 31.1 million employees, or 49 percent of those within the scope of the study, were subject to retirement by their employer on the basis of age.[2]

The survey further revealed:

> Of the 573,800 employees who formally retired during 1972, 85,900 had been compelled by retirement plans or formal policies of their employer to do so. This represents 15 percent of all retirements from the private sector, nonagricultural firms in question.[3]

While informative, the cross-sectional rather than longitudinal nature of the Labor Department study limits its value for following retirement trends. There is no question regarding the increase in earlier retirement among American workers, although the full implications of that trend are just now emerging.[4] Obviously the need for more data is critical, especially to distinguish between voluntary and involuntary retirement.

The absence of complete and exhaustive detail does not justify inaction, however.

Further steps to combat age discrimination in employment are now required, both to augment our ever-expanding understanding of the problem, and to combat it by statute. From the greater knowledge now becoming available, it may be possible to bring about a reduction in age discrimination through more effective education of employers and labor organizations, as well as workers of all ages.

Certain potential sources of valuable data have not fully been utilized in this effort. The Social Security Administration conducts surveys of persons newly entitled to benefits. This could be an even

[2] U.S. Department of Labor, Employment Standards Administration. Age Discrimination in Employment Act of 1967, a report covering activities under the act during 1976 (1977).

[3] Ibid.

[4] Harold L. Sheppard and Sara E. Rix, "The Graying of Working America: The Coming Crisis in Retirement-Age Policy." New York, the Free Press, 1977 (forthcoming).

better source if the results were released in a timely manner. The most recent year for which findings have been published is 1970.[5]

The analysis and dissemination of this survey data should be expedited, and the Secretary of Health, Education, and Welfare should take appropriate action to do so.

In addition, the Secretary of Labor's long awaited study under section 5 of ADEA should, when completed, provide the basis for ongoing review of the situation at that time. Meanwhile, the focus on legislative efforts by the 95th Congress provides the principal hope of America's older workers for progress in the battle against age discrimination in employment.

1. Arguments for Mandatory Retirement

Hearings conducted by the Senate Committee on Aging, the House Committee on Aging, and other congressional units have provided a forum for supporters and opponents of mandatory retirement to make their case. Advocates of mandatory retirement have made the following major arguments:

(1) Mandatory retirement helps to create more job opportunities for younger workers. Mr. Gene F. Jankowski, a vice president for CBS, Inc., told the House Select Committee on Aging:

> It opens up promotional opportunities inside the company for younger people, assuring the company of fresh ideas in vital areas.[6]

(2) Mandatory retirement is predictable, and it enables management and employees to plan for the future. Mr. Jankowski added:

> It allows the employee to plan better for his or her own future, by completely removing any doubt as to the required age of retirement. It also provides the retirees with the freedom and income to pursue fulfilling goals in other areas while they are still young enough to do so. And it allows the company to plan far more efficiently for its future.[7]

(3) Compulsory retirement is easy to administer. Flexible retirement, on the other hand, would require complicated tests which may be difficult to administer fairly and to explain to workers.

(4) Compulsory retirement treats all older workers alike. It removes individual judgments—which may be arbitrary in some instances—concerning who should and who should not be allowed to continue working.

(5) Medical science has yet to develop the capability to make individual assessments concerning the physical and psychological competencies of employees. Even if these assessments could be made, substantial time and money would probably be required to make determinations of fitness. Moreover, management would quite likely experience difficulty in administering any individual fitness test fairly.

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[5] Virginia Reno, "Compulsory Retirement Among Newly Entitled Workers: Survey of New Beneficiaries." Social Security Bulletin, 35, March 1972, 3–15.
[6] U.S. House of Representatives, Select Committee on Aging, hearings, "Retirement Age Policies," part 1, Mar. 16, 1977, p. 31.
[7] Ibid.

(6) It is costlier for employers to maintain an older work force in terms of providing health insurance, life insurance, pensions, and other fringe benefits.

(7) A person's mental and physical skills decline with advancing age. Older persons, as a general rule, do not learn new skills as easily as younger persons. They typically have less education than younger workers, and it is not as current.

Proponents of mandatory retirement recognize, however, that this practice poses some disadvantages for the employee and the employer. Mr. Jankowski identified two major problems:

> Among the disadvantages is the fact that the company faces the loss of skilled employees who may have many more years of productivity. The employee obviously faces a loss of income—particularly those employees at the lower end of the income scale, although continuing increases in social security, which is now tied in with the cost of living, tend to slightly offset this.[8]

2. Arguments Against Mandatory Retirement

Labor force participation has declined markedly for older workers during the past three decades. In 1950, about one of every four persons 65 years or older worked. Today, that figure has shrunk to one in eight. This decline has occurred despite an increase in the average life expectancy and an improvement in the aged population's health. Today, only about 3 percent of our entire civilian labor force is older. Yet, they represent almost 11 percent of our total population.

Labor force participation has also fallen off sharply for middle-aged and older workers—persons in their forties, fifties, and above. In 1966, the labor force participation rate for white males aged 45 to 54 was 96 percent. A decade later—when these individuals were in the 55 to 64 age bracket—their rate dropped to 75 percent. Among nonwhite males, the decline has even been more pronounced. Nearly 91 percent of all nonwhite males 45 to 54 years old were employed in 1966. Ten years later, only about 66 percent were still working.

More Americans are challenging the trend toward earlier and earlier retirement. Many workers find it too costly to retire at 65 because they can typically expect their income to be cut in half. In addition, rising prices have shaken the economic confidence of those retiring several years ago on what was then considered a comfortable retirement income. Employers are also finding earlier and earlier retirement to be increasingly expensive for their pension plans.

In addition, a Harris poll conducted for the National Council on the Aging shed new light on public attitudes toward age discrimination and mandatory retirement.[9] Some of the key findings include:

> Nobody should be forced to retire because of age, if he wants to continue working and is still able to do a good job (86 percent of the public agree with this statement).[10]

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[8] Ibid.
[9] Louis Harris and Associates, Inc., "The Myth and Reality of Aging in America," Washington, D.C. National Council on the Aging, Inc., July 1974.
[10] Ibid., p. 213.

> Most employers discriminate against older people and make it difficult for them to find jobs (80 percent agree).[11]
>
> Most older people can continue to perform as well on the job as they did when they were younger (58 percent agree).[12]

The Harris study concluded that most hiring and firing decision-makers would not be opposed to an individualized method to determine who should and who should not be forced to retire. The study further projected that there are about 4 million unemployed or retired persons who would like to work.

The Senate Committee on Aging has also heard other arguments raised by persons throughout the Nation to justify flexible retirement policies.

Dr. Woodrow Morris, a former chairman of the Iowa Commission on Aging, called mandatory retirement a peculiar paradox in our society, saying:

> This matter leads me to comment on mandatory retirement on the basis of age, and on our efforts to employ retired persons through such special programs. This has always struck me as a peculiar paradox in our society.
>
> With regard to age discrimination in employment—of which mandatory retirement is the most notable example—I would support the current efforts of the Iowa Civil Rights Commission, and a bill now before the Iowa General Assembly which would remove mandatory retirement policies from the code of Iowa and provide for the continuation of employment as long as an individual is competent to perform the job. If this can be enacted into law, it will, along with the proposed Federal Age Discrimination Act of 1975, help rid our State of that ageism which tends to put people on the shelf without force.[13]

Former U.S. Senator William Brock challenged the constitutionality of mandatory retirement:

> As far as I am concerned, if you are capable of holding a job, it does not matter how old you are, you ought to be able to hold it. I do not see how, under the Constitution, somebody can automatically say you cannot have a job because you happen to be 67 years old. Maybe I should ask Mrs. Waller, in your experience, if you have run into that problem with your placing of people?
>
> At least from what I have heard, it is a problem, and maybe you can expand on it.[14]

Among the other major arguments against mandatory retirement:

(1) Chronological age alone is a poor indicator of ability to perform on the job. Mandatory retirement at a fixed age does not take into account a worker's abilities and capacities, which vary sharply from individual to individual. Representative Claude Pepper, chairman of the House Committee on Aging, said:

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[11] Ibid.
[12] Ibid.
[13] U.S. Senate Special Committee on Aging, hearings, "Future Directions in Social Security: Impact of High Cost of Living," pt. 15, Des Moines, Iowa, May 19, 1975, p. 1373.
[14] Ibid., pt. 25, Memphis, Tenn., Feb. 13, 1976, p. 2,174.

> Some persons dodder at 30, others at 80, and some pass through life without "doddering" at all.[15]

(2) Mandatory retirement is based, to a certain degree, upon a misconception that older workers do not perform as well on the job as younger persons. However, several studies indicate that they perform as well as their younger counterparts, and in some cases noticeably better. Ms. Lou Glasse, director of the New York State Office for the Aging, challenged the notion that advancing age results in a loss of productivity, saying:

> This has shown to be false by a number of studies, including one conducted by the New York State Division of Human Rights. The findings of these studies demonstrate that in the areas of attendance, punctuality, on-the-job safety and work performance, workers over 65 years of age are, generally, equal to, and in some cases, "noticeably better" than workers under 65.[16]

(3) Mandatory retirement can cause financial hardship for older persons. Many elderly individuals need to work because social security benefits are inadequate. Mandatory retirement can also cause lower social security benefits if the last years of an employee's job should produce higher earnings than the earlier years. It can also be disadvantageous for women who oftentimes have an in-and-out work pattern. Compulsory retirement limits their working years, which in turn, can reduce their ability to build up pension benefits.

(4) Mandatory retirement can have adverse physical and psychological effects. The American Medical Association's Committee on Aging says:

> Enforced idleness robs those affected of the will to live full, well-rounded lives, deprives them of opportunities for compelling physical and mental activity, and encourages atrophy and decay.[17]

(5) Compulsory retirement increases the costs of income maintenance programs, such as social security. It also adds to the cost of private pension programs.

(6) Forced retirement is based upon the myth that older workers must "make way" for younger workers. Ms. Lou Glasse vigorously contested this notion:

> This idea fails to take into consideration the fact that by allowing older people to remain in the labor force, society gives them the chance to earn income which in turn increases their buying power and the overall demand for consumer goods. This, of course, increases the demand for labor. Thus, keeping older people employed may in fact open up more jobs for younger people than does the use of mandatory retirement.[18]

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[15] Letter from Representative Claude Pepper to Washington Star. Reprinted, 123 Congressional Record 11606, July 11, 1977.
[16] Testimony by Lou Glasse, director, New York State Office for the Aging, hearings on mandatory retirement, New York State Assembly, Committee on Aging, New York, N.Y., Jan. 21, 1977.
[17] Sharon House. "Mandatory Retirement." Library of Congress, Congressional Research Service, 76–157–ED, Aug. 20, 1976, p. 13.
[18] Testimony by Ms. Lou Glasse, op. cit.

(7) Another myth is that retaining a worker past the normal retirement age automatically increases an employer's pension costs. There are several options available to prevent any increases in pension costs. For example, workers remaining past the normal retirement date can receive the same dollar benefit upon actual retirement that they would have received if they retired on the normal date. In this instance, an employer's costs may be reduced because (a) he no longer contributes to the pension on behalf of the older employee, and (b) the pension benefits do not begin until later in the employee's life.

Part 3

LEGISLATIVE ACTIONS AND RECOMMENDATIONS

Today, persons 65 or older account for about 11 percent of our total population. In less than 50 years, they may represent 16 percent, or about 1 of every 6 Americans.

America's population is becoming increasingly older. In a very real sense, we are witnessing the "graying of America." This trend may have as much impact on our way of life as urbanization, the industrial revolution, the civil rights movement, or equal rights for women.

Yet our attitudes about work and retirement are based largely upon concepts originating in a different era. Many of these notions are outmoded and need reexamination.

Today, older workers are oftentimes forced against their will into idleness. Increasingly, those in their early sixties, fifties, and sometimes in their forties are being edged out of the labor force.

"Ageism" in employment is still a very real and serious problem. This form of discrimination is cruel and self-defeating. It undermines the spirit of those who want to remain active or need to work to supplement inadequate retirement benefits. At the same time, it robs our Nation of the skills and experience of those who can continue to make a contribution if given the opportunity.

These facts have prompted several different legislative approaches during the first 6 months of the 95th Congress to respond to the employment needs of older workers.

A. AGE DISCRIMINATION IN EMPLOYMENT ACT AMENDMENTS

Senator Pete Domenici, joined by Senators Church, Hansen, and others, took the lead in January when he sponsored S. 481 to remove the age-65 cap for the Age Discrimination in Employment Act. Senator Domenici gave this rationale:

> Mr. President, I submit that chronological age alone is a poor indicator of ability to perform a job. Compulsory retirement at a certain age does not take into consideration actual, differing abilities, and capabilities. Many Members of the Congress certainly demonstrate that fact. Obviously many workers can continue to work effectively beyond age 65. Furthermore, compulsory retirement does not take into account increased life expectancy and higher health levels for older persons. In fact, there is ample clinical evidence that forced

retirement actually accelerates the aging process for many individuals.[1]

Senator John Heinz introduced a bill (S. 1583) on May 23 to remove the age-65 ceiling for the Age Discrimination in Employment Act. The Heinz bill would also prohibit employee benefit plans from involuntarily retiring older workers because of age.

Senators Kennedy (S. 1768), Javits, Eagleton, and Chafee (S. 1773), and Williams and Church (S. 1784), introduced legislation during the last week of June to prohibit employee benefit plans from mandatorily retiring workers prior to the upper age limit of the Age Discrimination in Employment Act. The Javits bill would also raise the upper age limit for the ADEA to 68 in 1978, to 70 in 1980, and to 72 in 1982. S. 1773 would remove the age-72 ceiling completely in 1985. The Williams and Church proposal would raise the upper age limit of the Age Discrimination in Employment Act from 65 to 66 (120 days after enactment), to 68 (1 year later), and to 70 (2 years later). S. 1784 would direct the Secretary of Labor to complete a study (within 1 year after the upper age limit reaches 70) to determine the feasibility of raising the limit above 70 years of age.

On July 25, the House Education and Labor Committee approved H.R. 5383, the Age Discrimination in Employment Act (ADEA) Amendments of 1977. Key provisions in H.R. 5383 include:

The upper age limit of the act would be increased from 65 to 70 years (180 days after enactment).

The Secretary of Labor would be directed to conduct a study to determine the feasibility of eliminating the upper age limit of the ADEA entirely.

The age-70 limitation now applicable to Federal employees would be removed.

Involuntary retirement because of age would be prohibited under a seniority system or employee benefit plan. However, any employee 65 or older but less than 70 years old could be mandatorily retired under a collectively bargained agreement until 2 years after the date of enactment or until the expiration of the existing collectively bargained agreement, whichever shall occur first. The purpose of this postponement is to avoid any administrative disruption in changing existing contracts between management and labor.

The $5 million authorized funding ceiling for the ADEA would be removed.

B. CIVIL RIGHTS ACT AMENDMENTS

On other fronts, Representative Roybal sponsored H.R. 1981 to amend the Civil Rights Act to protect the employment rights of the elderly. Title VII of the Civil Rights Act now prohibits employment discrimination because of race, national origin, religion, and sex.

C. CIVIL SERVICE ACT AMENDMENTS

House Members—including Representatives Murtha and Spellman—have introduced bills to repeal the provisions of the Civil Serv-

[1] 123 Congressional Record 1573, Jan. 28, 1977.

ice Act requiring mandatory separation of employees who reach age 70.[2] The Civil Service Commission has notified the House Post Office and Civil Service Committee that it favors elimination of mandatory retirement in the Federal Government at age 70.

D. EARNINGS LIMITATION

One of the most commonly cited employment barriers for older workers is the social security earnings limitations for beneficiaries under age 72. In general, a beneficiary under age 72 may earn up to $3,000 before benefits are reduced. For earnings exceeding this ceiling, $1 in benefits is withheld for each $2 of earnings.

As of this date, 133 bills have been introduced in the House to change this provision, including 73 proposals to repeal it outright. In the Senate, there are 20 bills to increase or repeal the so-called social security retirement test. Of this total, eight would either repeal or phase out the earnings ceiling entirely, or for certain groups (e.g., the blind or persons 62 years or older).

E. DELAYED RETIREMENT CREDIT

Congress enacted a delayed retirement credit in 1972 in recognition that some persons work beyond age 65 and receive no social security benefits; yet, they continue to pay the social security tax. The existing credit provides a 1-percent bonus per year for persons who do not receive social security benefits because they work after age 65 until age 72.

Senator Hansen introduced S. 615 to increase the delayed retirement credit from 1 percent to 6⅔ percent per year. The purpose is to provide incentives for individuals who want or need to work. For example, S. 615 would allow individuals who continue to work until age 72 to increase their social security benefits by 46⅔ percent.

F. RECOMMENDATIONS

Probably no form of age discrimination in employment is as pernicious or far-reaching in its impact as mandatory retirement. In effect, it consigns a person to the sidelines of human activity, imparting a cachet of uselessness in a society that equates personal worth with work.

Several immediate actions are needed to develop comprehensive national policies to overcome "ageism" in employment and establish comprehensive programs to maximize job opportunities for middle-aged and older workers. First, the Age Discrimination in Employment Act needs to be strengthened by:

—Removing the upper age limit for application of the act. If this cannot be achieved immediately, it is recommended that the age-65 ceiling be raised in stages, with the ultimate goal of removing the cap entirely.

—Prohibiting involuntary retirement because of age, whether connected to a pension plan or for any other reason.

—Removing the $5 million ceiling for authorized funding.

[2] Representative Murtha introduced H.R. 6861, and Representative Spellman sponsored H.R. 7945.

—Prohibiting discrimination in apprenticeship or training programs.

—Revising the 180-day time limit for instituting private suits when conciliation efforts are underway to avoid dismissal of plaintiff claims.

Involuntary retirement for Federal employees reaching age 70 should be abolished.

Other legislation to provide older workers with new skills is also needed, as well as incentives for employers to hire them. In addition, steps must be taken to remove employment barriers. To achieve these goals, it is further recommended that:

—A midcareer development services program for middle-aged and older workers be established either as a special emphasis program in the Department of Labor or as a part of the Comprehensive Employment and Training Act.

—The $3,000 social security annual earnings limitation should be raised to permit individuals to earn more before their benefits are reduced. In addition, the upper age limit for the retirement test could be reduced from 72 to 70 to conform with the proposed age ceiling for ADEA in legislation now before the Congress.

—The delayed retirement credit for social security beneficiaries who continue working after 65 should be increased from 1 percent to 6⅔ percent per year.

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